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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 114

THE STATE CORPORATION COMMISSION FOR THE STATE OF KANSAS, HOMER HOFF, JESSE W. GREENLEAF, ET AL., Appellants,

vs.

THE WICHITA GAS COMPANY, THE HUTCHINSON GAS COMPANY, THE NEWTON GAS COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

STATEMENT AS TO JURISDICTION.

MAY IT PLEASE THE COURT:

The appellants in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represent:

In

A.

Statutory Provision Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938 (United States Code, Title 28, Section 345), provides that Section 238 of the Judicial Code is amended to read in part as follows:

> "Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections, and not otherwise:
>
> * * * * * * *
>
> (3) Sec. 380 of this Title."

Section 380 of said Act, being Sec. 266 amended of the Judicial Code, reads in part as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or

> to a circuit or district judge, and shall be heard and determined by three judges of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. * * *
>
> An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. * * *
>
> The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

The Act of February 13, 1925, Chapter 229, Section 8, 43 Stat. 940 (U. S. Code, Title 28, sec. 350), reads in part as follows:

> "No writ of error, appeal or writ of certiorari intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *."

B.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on the 28th day of January, 1933.

The application for appeal was presented on the 19th day of April, 1933.

C.

Nature of Case and Ruling Below.

This is an appeal from the decision of a statutory three-judge court convened in the United States District Court for the District of Kansas, First Division.

The Cities Service Gas Company, a Delaware corporation, is engaged in the business of producing and transporting gas from Texas and Oklahoma and delivering it to distributing companies along its line, among which are the following in the State of Kansas: The Wichita Gas Company, The Hutchinson Gas Company, The Pittsburgh Gas Company, The Capital Gas & Electric Company, The Newton Gas Company, The Girard Gas Company, The Wyandotte County Gas Company, The Union Public Service Company, and The Western Distributing Company.

The common stock of each of such distributing companies, except the qualifying directors' shares, is owned by the Gas Service Company, a corporation. The stock of the Gas Service Company, except the qualifying directors' shares, is owned by the Cities Service Company, a Delaware corporation. The stock of the Cities Service Gas Company, except the qualifying directors' shares, is owned by the Empire Gas & Fuel Company. The stock of the Empire Gas & Fuel Company, except the qualifying directors' shares, is owned by the Cities Service Company.

The Western Distributing Company is a West Virginia corporation and a citizen of that State. The Union Public Service Company is a Delaware cor-

poration and a citizen of that State. The other distributing companies are Kansas corporations.

The Cities Service Gas Company furnishes gas to the distributing companies at the city gates under day to day contracts, which are oral, at forty cents per thousand cubic feet. Each of the distributing companies has contracted to pay Henry L. Doherty & Company one and three-fourths per cent of its gross revenue, a per diem charge and expenses for certain specific services, and an engineering fee of five per cent of the cost of new construction, in consideration of which Henry L. Doherty & Company maintains legal, managerial, engineering, accounting and purchasing staffs whose services are available to the distributing companies.

Each of the distributing companies has also entered into a contract with the Gas Service Company under which the latter furnishes and the former pays for certain services. This contract has been approved by the Commission and is not in controversy on appeal.

On July 2, 1931, the Public Service Commission commenced a proceeding against the corporations hereinbefore named, except the Cities Service Company and the Cities Service Gas Company. It found that the reasonableness of the contracts hereinbefore referred to, and the charges made for services and commodities furnished thereunder, should be inquired into and a determination made of the amounts which properly should be set up as operating expense of the distributing companies on account of expenditures made for such commodities and services under such contracts,

and entered an order on such findings for a hearing to inquire into the reasonableness of such contracts and charges, and directed that respondents in such proceeding furnish such information concerning such contracts as the Commission might desire, and "show cause why such holding company contracts, or service or commodity charges, should they be found to be unreasonable, should not be disallowed as operating expense of the distributing companies, and adjustment made in this respect as to charges made to the consumers."

The Public Service Commission assumed jurisdiction to inquire into the reasonableness of the contracts under the authority expressed in the case of *Smith* v. *Illinois Bell Tel. Co.*, 282 U. S. 133, and *Western Distributing Company* v. *Public Service Commission of Kansas*, 285 U. S. 119.

After a hearing the Commission, on July 20, 1932, made findings to the effect that any amounts paid by the Distributing companies under their contracts with Henry L. Doherty & Company were unreasonable, and that any amounts paid by the distributing companies to the Cities Service Gas Company for gas in excess of 29.5 cents per thousand cubic feet at the city gates were unreasonable, and ordered that on and after August 1, 1932, the distributing companies (1) cease setting up on their books as operating expenses the one and three-fourths per cent payments to Henry L. Doherty & Company and any payments for gas to the Cities Service Gas Company in excess of 29.5 cents per thousand cubic feet, (2) give no consideration to

any such payments in fixing their rates to domestic consumers, (3) reduce their rates to their consumers proportionately, pending a final determination of their rates; and show cause on September 1, 1932, why such reductions should not be made permanent.

A petition for rehearing was filed by the respondents setting up fifty-one grounds. A rehearing, limited to one of such grounds, was granted. After such rehearing, the Commission increased its finding of a reasonable charge for gas at the city gates from 29.5 to 30 cents, and with that modification and the necessary changes in dates, on August 31, 1932, re-entered its order of July 20 in the form of two orders.

The material portions of the first of such orders is as follows;

> "That on and after the first day of September, 1932, the distributing companies, respondents above named, shall cease to set up on their books as an expense item any payments made to Henry L. Doherty & Company under the contract above mentioned, because of the one and three-fourths per cent charge, and also any payments made to Cities Service Gas Company for main-line town border gas in excess of 30 cents per M. C. F., and should give no consideration to any such payments in fixing a rate for the domestic consumer.
>
> "That on the 17th day of October, 1932, the distributing companies, respondents above named, appear before the Public Service Commission, at 10 o'clock a. m., and show cause to the Commission why the reduction in expenses as above set forth should not be passed on to the

consumers with such other reductions as may be found reasonable."

The material portion of the second of such orders is as follows:

> "It is therefore by the Commission ordered, that effective September 1, 1932, and until a hearing is held and an order issued, that the distributing companies, respondents above named, shall charge rates to the consumers as follows:
>
> "All distributing companies paying a gate rate in excess of 30 cents per M. c. f., shall deduct the difference between what the distributing company is now paying at the city gate and 30 cents per M. c. f. and pass on this difference to the consumer."

The nine distributing companies and the Cities Service Gas Company brought separate suits in equity to enjoin the enforcement of the two orders of August 31, 1932. The Public Service Commission of the State of Kansas and Jesse W. Greenleaf, Thurman Hill and C. W. Campbell, as members of said Commission, and Roland Boynton, Attorney General of the State of Kansas, were made parties defendant.

These actions were commenced on September 19, 1932, within the thirty-day period required by Sections 66-118, Revised Statutes of Kansas 1923.

The several bills alleged diversity of citizenship as to the Cities Service Gas Company, The Western Distributing Company and The Union Public Service Company, and alleged that the orders are confiscatory of plaintiff's property, impair the obligation of their

contracts, deny to them the equal protection of laws, and unconstitutionally interfere with interstate commerce.

An application was made for a temporary injunction. At the hearing thereon, the Commission confessed that the second order made on August 31, 1932, was in conflict with Section 66-118, Revised Statutes of Kansas 1923, which prescribes that an order cannot become effective until thirty days after it is entered, and consented that the enforcement of such second order might be permanently enjoined. A temporary injunction was granted against the enforcement of both orders.

The cases were consolidated for trial. Upon the trial the evidence introduced before the Commission was received in evidence, supplemented by an agreed abstract of such evidence, and by stipulation and other evidence.

The case was heard by the statutory three-judge court on the 10th day of November, 1932. The case was taken under advisement and on the 5th day of January, 1933 Judge Phillips handed down an opinion and finding of fact concurred in by Judge McDermott. The opinion and findings of fact increased the valuation or rate base as found by the Commission from $73,170,510 to $82,380,583. The opinion and findings decreased the net income available for return on investment as found by the Commission from $6,769,936 to $5,860,327. The majority court further found that on these calculations the company would be making but 7.11 per cent and the reduction of 10 cents as ordered by the Commission would reduce the rate

of return to 4.8 per cent which it found to be confiscatory.

On the 14th day of January, 1933, Judge Hopkins handed down findings of fact and dissenting opinion holding that the order of the Commission was reasonable and supporting the findings of the Commission with but a few immaterial exceptions as to the valuation and net earnings.

On the 28th day of January, 1933, the statutory three-judge court, for the District of Kansas, First Division, entered its decree in part as follows:

> "That the defendants, the Public Service Commission of the State of Kansas, and the members thereof, and Roland Boynton, Attorney General of the State of Kansas, and each of them, their agents, servants, and employees, and all other persons acting under or through their authority, be and they are hereby permanently enjoined and restrained in the enforcement and execution of the provisions of two certain orders of said Public Service Commission dated August 31, 1932, insofar as the said orders require that the distributing companies, plaintiffs in the above named cases, should cease to set up on their books any payments made to Cities Service Gas Company for main line town border gas in excess of 30 cents per M. C. F., and should give no consideration to any such payments in fixing a rate for the domestic consumer; and, insofar as they and/or either of them require that effective September 1, 1932, and until a hearing is held and an order issued, the said distributing companies should charge rates to the consumers as follows:

> "All distributing companies paying a gate rate in excess of 30 cents per M. C. F. should deduct the difference between what the distributing companies were then paying at the city gate and 30 cents per M. C. F., and should pass this difference to the consumer."

Said decree did not enjoin the Appellants from enforcing the order as to the payment of the 1¾ per cent to Henry L. Doherty & Company, and this appeal is only from that part of the decree enjoining the enforcement of the orders of the Commission as to the gate rate for gas at 30 cents per M. C. F.

After the entering of said decree the 1933 Legislature of the State of Kansas, abolished the Public Service Commission of Kansas, and recreated the same as the State Corporation Commission of Kansas, and by said act the terms of office of Jesse W. Greenleaf, Thurman Hill and F. E. McMullan, successor to C. W. Campbell, expired and Homer Hoch, Jesse W. Greenleaf and Ernest E. Blincoe succeeded them as members of the State Corporation Commission.

That on the 19 day of April, 1933, the said District Court made an order substituting the said the State Corporation Commission and Homer Hoch, Jesse W. Greenleaf and Ernest E. Blincoe as members thereof as defendants in place of the defendants, the Public Service Commission of Kansas and Jesse W. Greenleaf, Thurman Hill and C. W. Campbell.

D.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

In *Herkness* v. *Irons*, 278, U. S. 93, 73 L. Ed. (U. S.) 198, it was decided that the District Court has jurisdiction of a bill challenging the validity under the Federal Constitution of an order of the State Administrative Board and that the Supreme Court has jurisdiction on direct appeal.

See, also, *Oklahoma Natural Gas Company* v. *Corporation Commission of the State of Oklahoma*, 261 U. S. 290, 67 Law Ed. (U. S.) 659; *Western Distributing Co.* v. *Public Service Commission*, 252 U. S. 283.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of the sections of the judicial code herein set out.

Respectfully submitted,

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